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No. 75-4

In the

Supreme Court of the United States

OCTOBER TERM, 1975

NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Petitioner,

vs.

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE, et al.; THE PEOPLE OF THE STATE OF ILLINOIS, et al.; and THE CITY OF GARY, INDIANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief for Respondent City of Gary, Indiana, in Opposition to the Petition, and in Response to the Government's Memorandum

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QUESTION PRESENTED

The court below[2] in reviewing a final order of the Atomic Energy Commission—now Nuclear Regulatory

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[1] This Brief in Opposition to the Petition for Certiorari is filed by the City of Gary, Indiana, identified as one of the Petitioner-Intervenors in the court below, and a Respondent in this Court, and also responds to the Government's Memorandum received on September 2, 1975.

[2] The opinion below, Porter County Chapter of the Izaak Walton League v. A.E.C., is reported at 515 F.2d 513 (7th Cir. 1975).

Commission[3]—which had granted a permit to Northern Indiana Public Service Company (NIPSCO, the Petitioner here) for construction of a nuclear reactor at Petitioner's Bailly site in northwest Indiana, held that the Commission failed to follow its own regulations which are binding on it (515 F.2d 513, 522), and that the Commission failed to give due consideration to the population density and use characteristics of the site environs as required by 10 C.F.R. §100.10(b) (515 F.2d at 530).

The question presented is whether this Court should review the decision below which protects the safety of residents, workers and visitors who live, work and recreate adjacent and near to the proposed Bailly site, and which will not impede further residential and industrial development in the Gary, Portage and Port-of-Indiana area, which has no prospective national legal significance, and which is legally correct.

STATEMENT

The Proceedings Below

On the first day of public hearings of the Commission's Atomic Safety and Licensing Board on the application of NIPSCO for a construction permit for a commercial nuclear reactor at the Bailly site, the City of Gary, Indiana, represented by its Health Commissioner, Dr. Herschel Bornstein, urged that the Atomic Energy Commission withhold issuing a permit for the Bailly site. (Bornstein, Tr. 232-33). Dr. Bornstein stated that human life and health should take precedence on any priority scale; that to relocate the plant southeast of Bailly to

[3] The change in the Commission's name became effective on January 19, 1975, pursuant to the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233-1254.

rural Indiana would reduce the potentially damaging radiation exposure by many times; that the cost of the site change in view of the increased safety benefits would be minimal; and that the cost-benefit model should weigh more heavily the lives of people and the potential for health damage. (Bornstein, Tr. 233).

Thus, at the outset of the proceedings below, the City of Gary suggested to the Commission that the Bailly site was ill suited as a location for a commercial nuclear reactor—that a site further from the dense population centers of northwest Indiana would protect the important dimension of public health and safety.

Nonetheless, the A.E.C. Licensing Board ultimately issued the construction permit for the densely populated Bailly site although finding that an acceptable, and considerably less densely populated alternative site was available approximately 30 miles to the southeast of Bailly.[4] (RAI-74-4, 557, 631). Subsequently, the A.E.C. Appeal Board affirmed the Licensing Board's issuance of the construction permit for the Bailly site. (RAI-74-8, 244, 276).

Following the final agency decision and docketing of an appeal in the court below by those organizations and individuals who had opposed the Bailly site throughout the administrative hearings, the State of Illinois and the City of Gary respectively moved in the Court of Appeals to intervene as petitioner-intervenors. The motions pursuant to 28 U.S.C. §2348 were granted. The City of Gary,

[4] The Atomic Safety and Licensing Board's decision is reported at RAI-74-4, 557. (April 5, 1974). The subsequent decision of the Atomic Safety and Licensing Appeal Board is reported at RAI-74-8, 244 (August 29, 1974).

as well as the State of Illinois, have subsequently participated fully in the briefings and argument in the court below.

The Factual Setting

Pursuant to provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321, §4332, as applied to the Commission in *Calvert Cliffs' Coordinating Committee* v. *A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971), the Commission must make a "detailed statement" on "alternatives to the proposed action." 42 U.S.C. §4332(c)(iii) (1970).

In attempting to comply with the NEPA requirements and with its own 10 C.F.R. Part 50 NEPA-implementing regulations[5], the Commission concluded that the Bailly location was not the only acceptable site for the Petitioner's northern Indiana facility, but rather found that a site along the Kankakee river known as the Schahfer site in northern Jasper County was also one of the "best alternative sites for the nuclear facility." (RAI-74-8, 268). More significantly, the Commission's Licensing Board concluded that:

> "In respect to potential risk to population, the Schahfer site would be a plus." (RAI-74-4, 624).

Neither the Petition nor the Government's Memorandum, moreover, inform this Court that:

[5] In the court below, the City of Gary argued that in fact the Commission failed to comply with the NEPA requirements by relying on an incomplete cost-benefit analysis comparing radiological hazards between the Schahfer and Bailly sites, and by using never promulgated "regulations" as a basis for conclusive findings so as not to consider the consequences of postulated accidents. These questions were not dealt with by the court below; the City of Gary would argue these issues before this Court should Certiorari be granted.

(1) NIPSCO owns this 4,200 acre "best alternative" site (Bohn and Criner, p. E-38-38, following Tr. 4708);[6]

(2) NIPSCO is constructing "the first of four 500 megawatt coal fired units" on this site; (Bohn and Criner, p. E-38-24, following Tr. 4708); and that

(3) NIPSCO admitted below the viability of this Schahfer location for the proposed nuclear power plant in question. (Criner, Tr. 4881-82).

Consequently, to understand fully why the court below concluded that the Commission had failed to give due consideration to population densities and use characteristics of the Bailly site environs, a review of the Bailly and alternative Schahfer sites is necessary.

(1) The Bailly Site

The Petitioner's proposed Bailly site consists of 350 acres along the south shore of Lake Michigan in Porter County, Indiana, 5.25 miles east of the eastern boundary of the city of Gary, Indiana, a city of 175,415 citizens[7]

[6] "The Rollin M. Schahfer Generating Station site is located in the northeast portion of Jasper County, Indiana. . . . The site consists of about 4,200 acres of land lying immediately south of the Kankakee River in Kankakee Township. Most of the land for the site was acquired [by NIPSCO] in 1972. A major portion of the site was rezoned from 'suburban residential' to 'open industrial' by the Jasper County Plan Commission on February 28, 1972. . . . The land surrounding the Schahfer site is a productive agricultural area. Approximately 77% of the land in the seven counties represented in the fifteen mile area around the site exist as farmland. . . ." (Bohn and Criner, p. E-38-38, 45, following Tr. 4708).

[7] Source: 1970 Census of Population and Housing, U.S. Department of Commerce, Bureau of the Census, PHE (2)-16, INDIANA, July 1971, p.5.

in 1970, (515 F.2d at 517-18), and 1.1 miles east of the eastern boundary of the City of Portage, Indiana. (515 F.2d at 520). Downtown Chicago (the "Loop") is approximately 30 miles from the Bailly site, while the area south and west encompasses a "vast industrial and urban complex." (515 F.2d at 518). Within this urban complex to the west and southwest are the Indiana cities of Portage, Gary, Hammond, East Chicago and Whiting, along with numerous other Indiana municipalities including Wheeler, Merriville, Hobart, East Gary, Highland, and Munster. The Illinois State line and the southeast boundary of the City of Chicago are approximately 20 miles from the Bailly site.

The area to the west and southwest of the Bailly site includes one of the more concentrated industrial regions of the United States.[8] The region's industry and resident population over the past several years have been growing and extending eastward and southward into central and southern Lake County, Indiana, and into northern and north central Porter County to the very boundary of the Bailly site.[9] Immediately adjacent to the south and west of

[8] "The Gary-Hammond-East Chicago SMSA, a major center of heavy industry and the second largest metropolitan area in Indiana, grew from 574,000 in 1960 to 633,000 in 1970, or by 10 percent. . . ." 1970 Census of Population and Housing, U.S. Dept. of Commerce, Bureau of the Census, PHE(2)-16, INDIANA, July 1971, p. 6.

[9] "The population of Porter County, which is in the Gary-Hammond-East Chicago SMSA, grew by 45 percent from 60,000 to 87,000. Two-thirds of the growth was due to net immigration. Lake County, which includes the three central cities of the SMSA, had a net outmigration of 43,000, suggesting a sizable migration from Lake County to Porter." 1970 Census, *supra*, p. 6. See map in Appendix to this brief showing locations of neighboring cities and towns to the Bailly site, a map from the record below. (Read, following Tr. 7391).

the site is the relatively new and still enlarging steel complex of Bethlehem Steel Corporation's Burns Harbor Plant employing at least 7,500 workers. (515 F.2d at 518). Less than two miles due west of the Bailly site is the now operational Port of Indiana and adjacent Midwest Steel complex a division of National Steel Corporation, another new and rapidly expanding steel-making center.[10]

Only 1.1 miles west of the Bailly site is the eastern boundary of the rapidly growing City of Portage, Indiana. Portage in 1970 had a population of 19,127, and a projected 1980 population of 29,000[11] (515 F.2d at 520). To the south of Portage is the expanding community of South Haven. East of the Bailly site are the towns and city of Dune Acres, Porter, Burns Harbor, and Michigan City, the Indiana Dunes National Lakeshore[12] and the Indiana Dunes State Park (which accommodates more annual visitors that any other State of Indiana park).

The record below indicates that plans for up to 87,000 persons a day to visit the Dunes National Lakeshore (which is currently being developed) and State park

[10] Midwest Steel Corporation recently announced plans to expand its Burns Harbor/Portage facility. The mill will become a fully integrated steel-making complex requiring thousands of additional workers. The "worker" population in proximity to Bailly will thus expand significantly in the immediate years.

[11] The 1960 population of Portage was 11,822 while in 1950 there was no population listed, Portage not even being in existence at that census. Source: U.S. Census of Population, 1950, 1960, U.S. Dept. of Commerce, Bureau of the Census, INDIANA.

[12] The Licensing Board acknowledged that the National Lakeshore property immediately east of the site was an "outstanding natural area of special significance for public edification." (RAI-74-4, 586; see also Appeal Board decision at RAI-74-8, 261-63).

have been made. (515 F.2d at 522). The National Lakeshore abuts the Bailly site while the State Park is approximately three miles to the east.

In view of these highly-used parks and major adjacent industry, it would be misleading to consider the people potentially affected by the normal operation or abnormal operation (postulated accidents, deliberate sabotage, etc.) of a nuclear power reactor at Bailly to be only the residents of Portage, Porter, Dune Acres, Chesterton, Ogden Dunes, and Burns Harbor, as well as unincorporated areas of Porter County living within five miles of the site.

The stipulated *resident* population within zero to five miles of the Bailly site expected in 1985 is 29,793. (515 F.2d at 518). The Commission, however, did not consider this population to be a "population center." To this figure, the Commission should have added all or a portion of the 7.500 Bethlehem employees who work only a few hundred feet from the proposed reactor as well as a significant portion of the 87,000 people who will visit the adjacent National and nearby State parks.[13] In addition, the thousands of current and expected additional employees of the expanding Midwest Steel complex as well as Port of Indiana employees working close to Bailly should not have been ignored.[14]

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[13] The Commission's Appeal Board in Southern California Edison Co. (San Onofre Station, Units 2 and 3), RAI-74-12, 937, 962 (1974), held that the word "residents" in the 10 C.F.R. Part 100 siting regulations includes "transients" such as park visitors. The same logic and rationale would extend to other "transients" in large numbers, to wit, industrial workers.

[14] "Population" is to be construed as including "shopping centers, manufacturing centers or other areas of population besides residences." (Butler, Tr. 6427).

The arithmetic is simple that by 1980, on a given day, 125,000 persons or more could be within 5 miles of the Bailly site. Indeed, a large portion of this figure would be within two miles of the site, to wit, the Bethlehem Steel and Port of Indiana employees, as well as segments of the Dune Acres, Porter, Portage and Burns Harbor residential populations, plus, as the court below noted, a significant portion of the planned for 87,000 maximum daily park vistors. (515 F.2d at 522).

(2) The Schahfer Site

As noted above, the NIPSCO owned 4,200 acre Schahfer site is 30 miles southeast of Bailly, and in contrast with Bailly is surrounded by Indiana farm land.[15]

The Commission's Licensing Board below stated that "the most significant issue presented to the Board in this proceeding has been the question of alternative sites." (RAI 74-4, 623). The Board reviewed sites it termed suitable for the nuclear reactor. The Board found that the Schahfer site is surrounded by a lower population density than Bailly, and concluded that the potential risk to population at the Schahfer site would be less than at the Bailly site. (RAI-74-4, 624).

A comparison of resident population densities between Bailly and Schahfer, as stipulated in the hearings below, follows:[16]

Distance From Site	Bailly Population		Schahfer Population	
	1970	1985	1970	1985
0-5 miles	20,432	29,793	2,663	3,201
0-20 miles	600,000	700,000	70,000	80,000
0-30 miles	2,276,579	2,502,531	378,286	473,215

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[15] See note 6, *supra*.

[16] Source: October 1973 Stipulation; Staff Ex. 12.

Unlike the Bailly site, moreover, there are no industrial complexes adjacent to or near the Schahfer site. There are neither national nor state parks nor other public recreational facilities adjacent to Schahfer. A state-owned forest and wildlife refuge area begins some two-and-one-half miles from the southeast corner of the 4,200 acre site in Jasper and Pulaski counties. The town of Kouts, Indiana is almost the same distance from the Schahfer site as Gary is from the Bailly site. Kouts, the largest town within 5 miles of Schahfer — had a 1970 population of 1,388.[17] Gary, with its boundary beginning 5.25 miles from Bailly, had a 1970 population of 175,415.[18]

On a given day, the *combined* residential, worker and recreational population within 5 miles of the Schahfer site would likely be less than 4,000, compared with 125,000 or more in the case of Bailly as explained above. Nonetheless, the Licensing Board concluded that "no significant weight can be given to the low population density surrounding Schahfer. . ." (RAI-74-4, 624), even though the Commission's siting regulations require that consideration must be given to concentrations of people. (10 C.F.R. §100.10(b)).

The Licensing Board found that the costs of construction at the Bailly and Schahfer sites "are not significantly different." (RAI-74-4, 624). In spite of the acknowleged negative environmental impact that a nuclear reactor at Bailly would have on the adjacent National Lakeshore, e.g., acid misting, ground water contamination, visual intrusion of a mammoth cooling tower, the Board stated that the delay associated with requiring

[17] Source: 1970 Census of General Population Characteristics, Ind., U.S. Department of Commerce, Bureau of the Census, PC (1)-B16, Indiana, Sept. 1971, p. 143.

[18] Id., at p. 85.

NIPSCO to move to a new site "tipped the scale" in favor of issuing a permit for Bailly. (RAI-74-4, 624-25).

In reviewing the Board's decision, the Atomic Safety and Licensing Appeal Board subsequently characterized the Schahfer site as the "choicest riverside location." (RAI-74-8, 266). The Appeal Board noted that the Schahfer site had already been partially developed, a fossil fueled unit was currently being constructed, new transmission lines had been erected, and presumably rights-of-way leading to and from the Schahfer location had been purchased. (RAI-74-8, 266).

Inexplicably, however, the Appeal Board, although commenting on what it called "slight" differences in projected environmental impacts between Schahfer and Bailly, remained silent about the staggering resident, worker and recreational population differences between the two sites.

(3) The Need for Power

The Licensing Board considered the need for power one of "the most crucial issues in this hearing." (RAI-74-4, 616). It noted that the need for power at a given future date depends upon four factors:

(1) projected electrical demand (peak loads); (2) power reserve to assure system reliability; (3) scheduled power plant additions; and (4) purchased power from other utilities. (RAI-74-4, 616). The Board then stated that the greatest uncertainty in assessing whether a power plant will be needed at a given time in the future is in projecting future growth in demand for electric power.

The procedure used by all parties in the hearings to calculate when the megawatt capacity of the proposed Bailly unit would be needed was to prepare charts showing "Total System Capacity" (internal generating capacity

plus purchased power) as against total projected power requirements based on various postulated growth rates. A "reserve capacity" was calculated for each year under two conditions: (1) with the proposed Bailly reactor capacity on line, and (2) without it, but including all other existing and planned non-nuclear sources of power available to NIPSCO. Using this procedure, it was agreed that the year at which the reserve capacity without Bailly dropped substantially below 15% was the year that Bailly "was needed."

Although the Board agreed with the statements of a witness that "higher power costs will reduce the demand for power" in the future (Read, Tr. 7116), (RAI-74-4, 617-618), it nonetheless concluded that it could not quantify what effects energy conservation might have on NIPSCO's projected demands. NIPSCO had originally projected an annual average increase in demand at eight percent for the period 1972 to 1979, but later modified these projections somewhat when a witness pointed out at the hearings that the starting 1972 figure used by NIPSCO was twenty percent above the actual 1971 peak load figure, amounting to what the Licensing Board agreed was erroneous and misleading "front-end loading." (Read, Following Tr. 7116, pp. 10-14)

Recent electrical demand experience in NIPSCO's service area reveals that the annual growth rate of the peak load in 1974 was substantially below the figure projected by NIPSCO in the proceedings below, and was in fact even less than the lowest postulated average annual growth figure used by the Board.[19]

[19] During May and June, 1975, the City of Gary, Indiana was a party-intervenor before the Indiana Public Service Commission in Indianapolis in hearings concerning requested electrical rate hikes sought by NIPSCO. An

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Protects the Health, Safety and Welfare of the People of Northwest Indiana.

The decision of the court below that the Commission violated its own regulations means that the residents of the towns of Burns Harbor, Chesterton, Dune Acres, Porter, Ogden Dunes and Beverly Shores, and the cities of Portage, Hobart, and Gary do not have to bear the risk of living in close proximity to a nuclear reactor potentially dangerous to their health and safety. The well being of the present and future employees of Bethlehem Steel, the Port of Indiana, Midwest Steel, Air Products and Chemicals Corporation and other nearby industries, as well as of the families, campers, hikers, picnicers, swimmers, naturalists and students who will use the Indiana Dunes National Lakeshore and Dunes State Park is also protected by the decision.

Nor will the economic welfare of the citizens or industry of northwest Indiana suffer vast consequences as a result of the decision below, contrary to the suggestion of Petitioner. (Pet. 20-21). The availability of an alternative site located away from the dense population,

[19] (Continued)
exhibit prepared by NIPSCO indicated that the 1974 "Native Load Classification at Time of Annual Peak" in 1974 was 1,887.6 megawatts, compared with a NIPSCO "Native Load at Time of Annual Peak" in 1973 of 1,804.1 megawatts. This amounts to an increase of only 4.63 percent for the year in peak load demand.

The fact of the matter is that growth in demand for electricity in northern Indiana has flattened out significantly as the actual 1973 and 1974 consumption figures reveal versus NIPSCO's extrapolated projections for this period based on experience in the 1960's.

recreational and industrial centers means that Northern Indiana can still obtain electricity generated through the use of nuclear fuel. NIPSCO, moreover, continues to have several options in meeting future electrical demand needs. NIPSCO's own witness testified that up to four 500 megawatt coal-fired units were planned for the 4,200 acre Schahfer site, and acknowledged that a nuclear unit could be built there. (Bohn and Criner, p. E-38-38, following Tr. 4708, and Tr. 4881-82). Of course, NIPSCO could fully utilize its purchased power rights, presently 800 megawatts.

The reactor and containment structures, if built at Schahfer would presumably create the same number and types of construction and engineering jobs as the proposed Bailly facility would have created. The nuclear facility if constructed at Schahfer could put on the line the same 685 megawatts as the proposed Bailly unit would have produced. The court below in commenting on possible consequences of shutting off or delaying a potential source of considerable energy in these times of energy crisis, was speaking generally in an obvious effort to balance the equities. (515 F.2d at 522). The record discloses no vast consequences if Bailly is not built, but rather reveals various alternatives available to NIPSCO to meet future power requirements in serving the needs of northern Indiana.

As to the Government's statement in its Memorandum (Gov. Memo. 10-11, and n. 13) that it estimated there would be about a three year delay if NIPSCO files a new application, neither the record below nor logic supports this conjecture. The Commission's own staff stated that the delay could be as little as 18 months. (RAI-74-4, 624). The Government's unsupported statement that it would take petitioner at least 12 months to prepare a new application, even if true, and that is doubtful, raises the question: 12 months from when? Having had its Bailly site rejected on April 1, 1975 by the court below, NIPSCO presumably has been at work developing plans for additional future generating capacity at another site. Moreover, even if there should be a three-year delay, it would be for the purpose of fulfilling the health, safety and environmental obligations Congressionally mandated. (42 U.S.C. §2133(d), 42 U.S.C. §4321 *et seq.*)

The Government's statement, wholly without any basis in the record, that at "present fuel prices, loss of the Bailly plant's generating capacity for three years can be expected to cost petitioner's consumers at least $60 million in excess fuel costs," (Gov. Memo. 10-11, n. 13), is based on a series of false premises and miscalculations. The figure, first assumes the unsupportable three-year delay which we discussed above. Second, the Government assumes a three-year Bailly operation at 60% capacity, but in fact actual operating experience is that commercial reactors of nominal 600 megawatts and up have a cumulative average performance of 50% of capacity. (Federal Energy Administration Report, "Improving the Productivity of Electric Power Plants" (March 1975)). Third, the projected alleged future costs excludes the higher capital costs required for constructing a nuclear-fueled plant over a fossil-fueled plant which the consumer must ultimately pay. Fourth, the assumption "at present fuel prices" used by the Government fails to include the significant price fluctuations in both nuclear fuel and fossil fuel.

Finally, the obvious should not be overlooked. The decision below held only that the issuance of a construction permit for the Bailly site was invalid. NIPSCO and the citizens of northern Indiana can still have nuclear

power—but at a site which meets all Commission criteria including those designed to protect public health and safety.

II. The Decision of the Court of Appeals Has No Prospective National Legal Significance.

On June 20, 1974, the Commission partially amended its 10 C.F.R. Part 100 site criteria regulations. The new §100.11 (a) (3) regulation provides in part that "political boundaries are not controlling in the application of this guide." 40 Fed. Reg. 26526-27 (June 24, 1975). The amendment was made immediately effective.

NIPSCO in its petition acknowledges that the Commission's June 20, 1975 new regulation "hopefully insures that no court will in the future hold that the Commission must measure population center distance from political boundaries." (Pet. 21). So too, the Government acknowledges that the "effect of the [Bailly] decision" is "limited by the new regulation." (Gov. Memo. 10).

We agree that the June 20, 1975, new 10 C.F.R. §100.11 (a) (3) regulation would seem to nullify any prospective precedential significance of the opinion below. We also agree that as a result of promulgating this new regulation, the Commission has attempted an end run around a judicial decision it does not support, which may mean that the decision's precedential value is minimal.

This is not to say, however, that we believe that the new June 20th regulation is valid or that it was properly promulgated. These considerations should be raised through direct challenges by parties affected by the new regulation *after the new regulation has in fact been applied in future construction permit proceedings.* The new 10 C.F.R. §100.11 (a) (3) regulation was not applied in Bailly. The court below construed what the former regulation meant in light of prior agency application and in light of the statutory purpose underlying the part 100 site criteria regulations—minimization of danger to public health and safety.[20]

The validity of the new regulation, the manner in which it was promulgated, the fact it was promulgated while this case was being prepared for this Court (see, e.g., *Chock Full O'Nuts Corp.* v. *United States,* 453 F.2d 300, 302-03 (2d. Cir. 1971)) — all of these serious questions should be raised in an actual controversy where the new regulation had been applied and where this Court's requirement of "concrete adverseness" would be satisfied. *O'Shea* v. *Littleton,* 414 U.S. 488, 493-94 (1974); *Flast* v. *Cohen,* 392 U.S. 83, 101 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

III. The Decision of the Court Below is Legally Correct.

The Commission's application of its 10 CFR §100.3 (c) and 100.11 (a) (3) regulations in the Bailly case required a "population center distance" of at least two miles from the reactor to the nearest boundary of a densely populated center containing more than 25,000 residents. Since the nearest boundary of Portage, Indiana is only 1.1 miles from the proposed Bailly reactor site, the court below ruled that the Commission failed to comply with its own regulations. (515 F.2d 513, at 522).

The Commission, of course, is bound by the precepts incorporated into its own regulations. *Yellin* v. *United States,* 374 U.S. 109 (1963); *Vitarelli* v. *Seaton,* 359 U.S. 535, 539 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957);

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[20] "In any event, no license may be issued . . . if . . . the issuance of the license would be inimical to the . . . health and safety of the public." 42 U.S.C. §2133 (d).

United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954).

The Commission has not consistently applied the population center distance in permit proceedings to the "actual location of populated areas" as contended, but in fact has most often used the political boundaries of cities or towns as the "boundary" of the nearest population center. See e.g., *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-74-34, RAI 74-5, 861, 865 (1974), and *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant), 4 A.E.C. 89, 91 (1968).

Even in this case, a political boundary was initially applied. The Commission's Division of Reactor Licensing's "Safety Evaluation" report on Bailly stated: "The nearest population center of greater than 25,000 persons is Gary, Indiana which has its city limits located 5.5 miles WSW of the [Bailly] site."[21] Later it was learned that Portage was only 1.1 miles from the site and would have a population exceeding 29,000 before 1980). The testimony of staff witnesses and the comments of even one Licensing Board member, moreover, reveal great uncertainty in how to measure population center distance. (See, e.g., Bohn, Tr. 611-14).

It is noteworthy that in the only instances where the Commission applied the word "boundary" to mean something other than a city boundary, application of the "city boundary" involved would have probably invalidated the proposed site. (In addition to Bailly, see *Consumers Power Co.* (Midland Plant, Units 1 and 2) 5 A.E.C. 214, 218 (1972), and *Consolidated Edison Co.* (Indian Point Unit 2, 5 A.E.C. 43, 45 (1972)).

[21] A.E.C. Staff Safety Evaluation, Bailly N-1, p. 4.

CONCLUSION

Power at the cost of unnecessary increased risks to the public health and safety is not in the public interest. Certainly Congress never intended that an admitted increased risk to human health and safety not be given significant weight in licensing commercial nuclear reactors. (42 U.S.C. §2133(d), §2232). But that is exactly what the commission did in this case. (RAI-74-4, 624).

In sum, the decision below protects the health and safety of people, does not prevent further residential or industrial development in northern Indiana, has minimum national legal precedential significance, and is legally correct, based on established principles of judicial review and administrative action. When an agency makes a mistake, the courts of appeals must have the ability to say so.

Thus, we respectfully urge this Court to deny the Petition for Certiorari.

Respectfully submitted,

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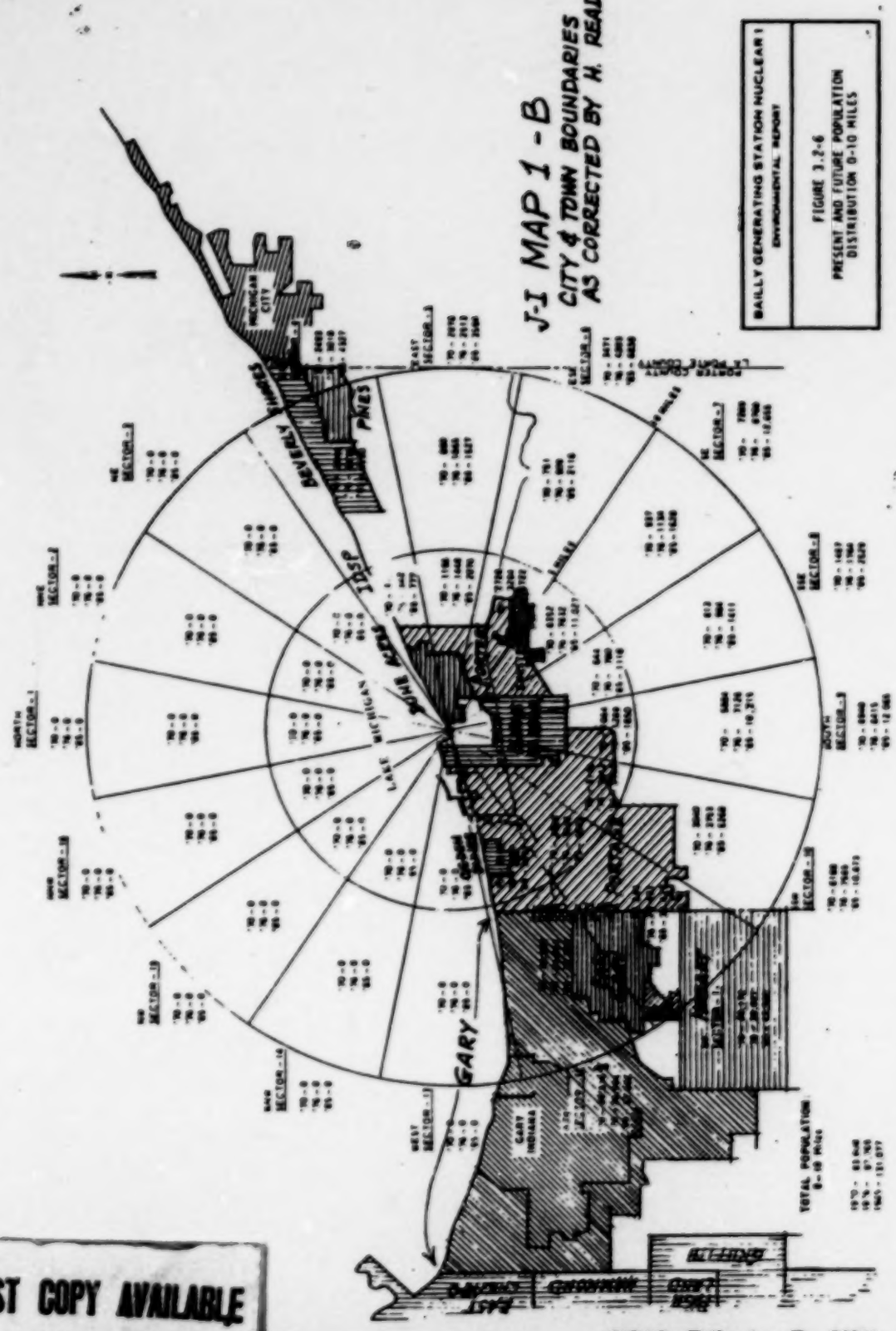
September 1975

APPENDIX

J-I MAP 1 - B
CITY & TOWN BOUNDARIES
AS CORRECTED BY H. READ



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(READ, Following Tr. 7391)